No. 12906

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

v.

RINA MARIA VATUONE, AS ADMINISTRATRIX OF THE ESTATE OF PAUL D. VATUONE, DECEASED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

JURISDICTION

The jurisdiction of the District Court rests upon the Public Vessels Act, 1925 (46 U. S. C. 781–789) by reason of a libel in admiralty, filed August 1, 1949, to recover damages for the death of libelant's decedent aboard the U. S. A. T. *General D. E. Aultman* on June 15, 1949.

This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal, filed March 26, 1951, from a decree in favor of the libelant entered on December 29, 1951.

QUESTIONS

Libelant's decedent, a civil service employee of the United States, serving in a shoreside position with the Army Transport Service, was killed in the performance of duty aboard an Army Transport undergoing repairs at an Army Base. His widow had two remedies, one under the Public Vessels Act, the other under the Federal Employees' Compensation Act. She first applied for compensation and then brought this suit to recover damages for wrongful death. When she received the compensation checks she returned them. The questions presented are—

1. Whether, in the absence of an explicit statutory direction for double recovery or election, government personnel or their dependents have a right of action against the United States for injury or death in the performance of duty or must accept as their sole recovery the benefits of the compensation, leave, and retirement statutes applicable to personnel of their type.

2. Whether applying for benefits under the applicable compensation statutes precludes government personnel or their dependents from thereafter maintaining suit for injury or death against the United States.

STATUTES

The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and as in effect at all times here involved provided in pertinent part:

> [Sec. 1.] That the United States shall pay compensation as hereinafter specified for the

disability or death of an employee resulting from a personal injury sustained while in the performance of duty * * *

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

STATEMENT

The facts respecting the injury of libelant's decedent Paul D. Vatuone are not disputed and may be summarized from the findings of the court below (R. 14–17). Vatuone was a shoreside civil service employee of the Army Transport Service working as a rigger in the marine repair shop at Fort Mason, San Francisco Port of Embarkation. With fellow workmen he was sent aboard the Army Transport *General D. E. Aultman* on June 15, 1949, to do certain repairs on one of the davits of No. 5 lifeboat (R. 15). Vatuone and another workman were manually winding a cable around the drum of the winch which operated the boat when other fellow workmen[1] "negligently put in operation the motor operating said winch so that said winch suddenly

[1] Specifically, libelant's attorney contended it was the ship's electrician. See R. 31–33, 120–121.

and very swiftly revolved around and the handle of said winch struck said decedent with such force that he was thrown violently to the deck and was killed." Libelant was survived by his dependent widow and his infant daughter (R. 16).

The facts in respect of libelant's claim and award of compensation appear from the file of the Bureau of Employee's Compensation. (Respondent's Exhibit D, in evidence R. 185–187.) On June 16, 1949, there was executed Bureau of Employees' Compensation Form C. A. 2, "Official Superior's Report of Injury" certifying Vatuone's accident to have been in the actual performance of duty (photostat 15–16). On June 23, 1949, libelant executed the Bureau's Form C. A. 5, "Claim for Compensation on Account of Death" (photostat 20–21) and on June 28, 1949, she executed Form C. A. 42, "Affidavit Relating to Representatives of Deceased Beneficiaries" (photostat 9–10). In the interval various other forms and statements appear to have been executed and copies of death, marriage, and birth certificates obtained and all necessary papers duly filed with the Bureau of Employees' Compensation. On the basis of this information, the Director of the Bureau, pursuant to Section 36 of the Compensation Act (5 U. S. C. 786) on August 3, 1949, made findings of fact and an award of compensation (photostat 2–4). The award allowed burial expenses of $200 and compensation at the monthly rate of $78.75, consisting of $61.25 for libelant and $17.50 for the child and advised libelant that about August 10, 1949, a check for $118.12, ac-

crued compensation for the period June 16 to July 31, 1949 would issue (photostat 2–4).[2]

Meanwhile, libelant had brought the present suit on August 1, 1949 (R. 1) and, acting on the advice of her attorneys, when she received the initial compensation check for $118.12, dated August 8, 1949, she returned it and thereafter returned all other checks (R. 133–137, 189–190, 195–197, 201–209, 221–222). The court below followed *United States* v. *Marine,* (4th Cir., 1946) 155 F. 2d 456, and held the availability of compensation did not preclude recovery by suit. He further summarized his view of the effect of libelant's conduct as follows (R. 12–13):

> The sequence of events in Mrs. Vatuone's case demonstrates that she commenced her libel under the Public Vessels Act after she had filed her claim but before an award was made by the government. She returned her check in the amount of $137.28 to the government when it arrived and at no time did she accept any compensation. These facts place the instant case within the language of *Mandel*

[2] By reason of the amendments to the Compensation Act by the Act of October 14, 1949, c. 691, 63 Stat. 854, this amount was increased effective November 1, 1949, and would now amount to $137.28 per month, consisting of $99.84 for the widow and $37.44 for the child. Letter from Bureau of Employees' Compensation, dated April 7, 1950. (Respondent's Exhibit D–1 in evidence, R. 187–189.) When the child marries, or attains majority the widow's compensation will increase to $112.32. Had libelant's decedent been in the military, instead of the civil service, her exclusive recovery, by reason of the rule in *Feres* v. *United States*, (1950) 340 U. S. 135, would have been under the military statutes by which, regardless of the rank of the decedent, a wife and one child receives $78.00 per month. See *infra*, p. 61, fn. 23.

> v. *United States,* 74 F. Supp. 754,[3] wherein the court said: "* * * I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here." Libelant did not accept compensation and is entitled to enforce her rights against the United States under the Public Vessels Act.

Judgment was accordingly entered against the United States and this appeal followed.

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that the libel stated a cause of action in respect of which the United States had consented to be sued under the Public Vessels and Suits in Admiralty Acts.

2. The District Court erred in failing to hold that, in the absence of explicit statutory direction for double recovery or election, libelant had no right of action against the United States but had her exclusive rights under the compensation, leave and retirement statutes applicable to the decedent.

3. The District Court erred in failing to hold that libelant's conduct in procuring an award of compensation and burial expenses and the issuance of checks therefor precluded her from maintaining the libel.

SUMMARY OF ARGUMENT

Introduction.—This case and its companions, No. 13054, *Allen* v. *United States,* and No. 13057, *Gibbs* v.

[3] (E. D. Pa., 1947). Subsequent to the decision below the *Mandel* case was reversed by the Third Circuit on August 16, 1951, which thus joined the majority of four circuits rejecting the view of the *Marine* case.

United States, present for this Court's decision a common question of great importance for the United States where death or injury of government personnel occurs in the performance of duty. Claimants on account of the death or injury of government personnel have two remedies, one by suit, the other by claim for compensation. The question is whether compensation, when available, precludes recovery by suit. The question is of great importance for the national security. But Congress and the Supreme Court have left it in a number of situations to judicial determination.

Congress by the Public Vessels, Suits in Admiralty and Tort Claims Acts, has provided a judicial remedy for suit on all types of claims for death or injury in circumstances where a private party would be liable. But the majority of courts have held, correctly we believe, that the existence of these two remedies, one judicial, by suit against the United States, the other administrative, by claim for compensation benefits, does not create or recognize a right of action for death or injury of government personnel in the performance of duty in the absence of explicit statutory direction for double recovery or election. Thus, although claimants have two *remedies,* their sole *recovery* is under the applicable compensation statutes. *Mandel* v. *United States,* (3d Cir.) decided August 16, 1951; *Lewis* v. *United States,* (D. C. Cir., 1951) 190 F. 2d 22; *Johansen* v. *United States,* (2d Cir.) decided July 30, 1951; *Posey* v. *United States,* (5th Cir., 1937) 93 F. 2d 726. This view has been rejected only by the

Fourth Circuit. *United States* v. *Marine,* (4th Cir., 1936) 155 F. 2d 456, followed in *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120; see also *Mandel* v. *United States,* (E. D. Pa., 1947) 74 F. Supp. 754, reversed (3d Cir.) August 16, 1951. In *Feres* v. *United States,* (1950) 340 U. S. 135, the Supreme Court applied the majority view to military service employees. The question of whether the same result should be reached in the case of civil employees, has not yet been decided by the Supreme Court.

The Government believes that, in addition to the absence of any right of action for death or injury of government employees in the performance of duty, in the present cases the United States has two additional defenses—the fellow servant rule and claimant's preclusion by obtaining awards or medical services under the compensation act. However, in view of the importance to the United States of the broader question of whether recovery by suit may be had for service-incident death or injury of government personnel, this brief, while not abandoning these two additional defenses, will be directed primarily to the contention that this Court should follow the majority rule of the *Mandel, Lewis, Johansen* and *Posey* cases, rather than the contrary view of the Fourth Circuit in the *Marine* and *Johnson* cases.

I. The Courts of Appeals for four circuits have held that absent explicit statutory direction for double recovery or election there is no right of action for death or injury of government personnel in the performance of duty and the rights under whatever stat-

utory scheme of compensation, leave and retirement benefits which may apply are exclusive. This view of the matter was applied to military service employees by the Supreme Court in *Feres* v. *United States,* (1950) 340 U. S. 135. It has been equally applied to civilian employees by the Courts of Appeals for the Second, Third, Fifth, and District of Columbia Circuits. *Johansen* v. *United States,* (2d Cir., decided July 30, 1951); *Mandel* v. *United States,* (3d Cir., decided August 16, 1951, reversing (E. D. Pa., 1947) 74 F. Supp. 754); *Posey* v. *United States,* (5th Cir., 1937) 93 F. 2d 726; *Lewis* v. *United States,* (D. C. Cir., 1951) 190 F. 2d 22.

The crux of the problem, as pointed out by Mr. Justice Jackson in *Feres* v. *United States, supra,* 340 U. S. at 144, is that in the absence of any provision by Congress it is equally possible that the claimant (a) may enjoy both recovery of compensation and of damages, or (b) may elect which to pursue, thereby waiving the other, or (c) may pursue both, crediting the larger liability with the proceeds of the smaller recovery, or (d) may enjoy only the right to compensation, leave and retirement, the existence of which precludes recovery in the exercise of the other remedy. In the words of Justice Jackson in *Feres* (340 U. S. at 144): "There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of

any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery."

II. There is no question but that Congress by the Public Vessels, Suits in Admiralty, and Tort Claims Acts has given a judicial remedy for death and injury of all kinds, including service-incident death and injury of civil and military personnel of the United States. But as Justice Jackson pointed out in the *Feres* case (340 U. S. at 140) the grant of jurisdiction generally to render judgment upon all such claims does not mean that a cause of action is recognized or created. It does not say that all such claims must be allowed. "Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists." It has long been settled "that no court would be justified in interpreting a grant of jurisdiction as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction." *Kuhnert* v. *United States,* (8th Cir., 1942) 127 F. 2d 824, 826.

This Court in *Thomason* v. *United States,* (9th Cir., 1949) 184 F. 2d 105; and *United States* v. *Loyola,* (9th Cir., 1947) 161 F. 2d 126, correctly in our view, held that the district court had jurisdiction under the Public Vessels Act of suits for wages and maintenance, but that the libelants in the respective cases had no causes of action against the United States. On the other hand, cases like *O'Neal* v.

United States, (E. D. N. Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871, in which the courts appear to place dismissal of suits by those entitled to compensation upon want of jurisdiction, rather than the lack of a right of action, are equally valid. Courts have only a limited jurisdiction of suits against the United States and therefore often say that there is no *jurisdiction* of libelant's claim when what they mean is that the claim does not constitute a *right of action* in respect of which the United States has consented to be liable. As Mr. Justice Holmes long ago observed, where the courts have only a limited jurisdiction, if there is no right of action for the claim, it is of a kind that the court not only ought not to enforce but has been granted no power to enforce. *The Ira M. Hedges,* (1910) 218 U. S. 264, 270. Thus, whether the opinions say that libelant has no right of action or is precluded from suit, and therefore dismiss on the merits, or say that there is no jurisdiction and dismiss solely on that ground, all the cases equally support the view that in the silence of Congress the exclusive rights for service-incident death or injury of civilian and military employees of the United States alike is under the applicable compensation, leave and retirement statutes.

III. The plain language of the compensation act as originally enacted in 1916 clearly contemplates that compensation is compulsory and exclusive and no change was made by the 1949 declaratory amendment. In enacting the Federal Employees' Compensation Act of 1916, as in enacting the Public Vessels

and Tort Claims Acts, great emphasis was placed on relieving Congress of the heavy burden of private relief legislation. While no jurisdictional remedy was then available to a Government employee to assert a right of action against the United States, if he had one, the language employed by the draftsmen of the compensation act shows the recovery of compensation was intended to be exclusive. The act provided in section 1 that the United States "*shall* pay compensation for disability and death of an employee resulting from a personal injury sustained in the performance of duty." No election by the employee nor any choice by the Government is provided. Moreover, in section 7 it is provided that, except for earned wages and military pensions, the liability for compensation is exclusive of "any salary, pay, or remuneration whatsoever." The intention is thus stated in plain language that compensation is compulsory and exclusive of any other right against the United States on account of death or injury in the performance of duty.

Both the Second Circuit in *Feres* v. *United States,* (2d Cir., 1949) 177 F. 2d 535, aff'd 340 U. S. 135, and the Supreme Court in *Dahn* v. *Davis,* (1922) 258 U. S. 421, have read the language of the 1916 act as declaring that compensation is exclusive. In *Feres* the claimant argued that the omission of any exception denying a judicial remedy where there was a right of compensation showed that the grant of a remedy recognized or created a right of action. The Second Circuit rejected this view observing that the language

of Section 7 plainly excluded any other right of recovery and "consequently, it would seem that the explanation for the omission * * * is that it was considered unnecessary" (177 F. 2d at 537). In so holding, the Second Circuit merely followed the earlier decision of the Supreme Court in the *Dahn* case where it was held that while there were two *remedies,* one by suit for tort, the other by claim for compensation, the sole *recovery* was under the compensation act. As the Supreme Court observed (258 U. S. at 429), "it would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injury other than as provided in the act" and it characterized the language of the whole act as evidencing (p. 430) "the disposition to treat the compensation provided for as adequate for the injury received."

Adoption of the 1949 declaratory amendment did not alter the preexisting exclusiveness of the 1916 Act. The new language relating to exclusiveness which the amendment added in section 7 (b) was purely declaratory. War Shipping Administration/Maritime Commission merchant vessel seamen already were allowed recovery only by suit and expressly excluded from compensation by decisions of the Comptroller General and by the Clarification Act of 1943. Ever since 1916, Army and Navy public vessel seamen, on the other hand, had been given compensation and had never, until *Mandel* v. *United States,* (E. D. Pa., 1947) 74 F. Supp. 754,

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(since reversed 3d Cir., decided August 16, 1951), been allowed to recover by suit. The Senate report on the legislation made it plain that the provision for exclusiveness was merely declaratory of existing law. But the seamen's unions were troubled by the possibility that the amendment might somehow change the status of seamen. Accordingly, a precautionary proviso was added making it specific that no modification of existing law was intended. The Senate floor discussion of the proviso confirms this purpose. Senator Douglas, in charge of the bill, expressly stated that Congress was not "seeking to legislate affirmatively" and did not intend, without hearing the representatives of the Army and Navy, to make any change in the existing law or affirmatively adopt the subsequently reversed view of the district court in the *Mandel* case. It results that no modification has been made in the original 1916 law, as declared by the Second Circuit in *Feres,* and by the Supreme Court in *Dahn,* that where compensation is available for service-incident death or injury, it is exclusive of any right of recovery by suit against the United States under whatever jurisdictional act provides the judicial remedy.

IV. Unless compensation is exclusive where available difficulties in respect of double recovery or election must result. Thus the omission of Congress to make any express provision to resolve such difficulties confirms the view of the Second Circuit in *Feres* v. *United States,* 177 F. 2d 535, and of the Supreme Court in *Dahn* v. *Davis,* 258 U. S. 421, 430,

that read together as a whole the various provisions of the Federal Employees' Compensation Act "emphasized the disposition to treat the compensation provided for as adequate for the injuries received and they negative any intention on the part of the Government to make further payments." The Supreme Court in *Feres* v. *United States,* 340 U. S. 135, gave controlling weight to this absence of express statutory direction for the resolution of the problem. The Court concluded that if Congress had contemplated that the United States would be held liable "it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." Accordingly, it held that "the absence of any such adjustment is persuasive that there was no awareness that the act might be interpreted to permit recovery" for service-incident injuries. The identity of the problem, whether civilian or military service employees are involved and the fact that, where military reservists on temporary active duty are concerned, the employee is given the right to elect between the military and the more favorable civilian compensation system, confirms the necessity for the same solution as to all types of employees.

The dispositive character of the silence of Congress on the point is fully demonstrated when cases trying to apply "election" are examined. Where crew members are involved, "election" is entirely unworkable. Seamen are a privileged class as wards of the admiralty judges. In line with their privileged status it has been held that even collection of cash

benefits does not preclude a seaman from recovery by suit. *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120; cf. *Bay State Dredging Company* v. *Porter,* (1st Cir., 1946) 153 F. 2d 827. The court below, however, has held to the contrary, *Wright* v. *United States,* (N. D. Calif., 1950) 95 F. Supp. 77, accord *Johansen* v. *United States,* (S. D. N. Y.) 1951 A. M. C. 117. Where shoreside employees are involved some courts have held that applying for any type of benefit operates to preclude the maintenance of suit. Other courts, including the court below, have taken a contrary position holding that even receiving payment under an award is not an "election." This divergence of views, we submit, confirms the practical correctness of the Supreme Court's statement in *Feres, supra,* that since "there is as much statutory authority for one as for another of these conclusions" the absence of any congressional direction "is persuasive that there was no awareness that the act might be interpreted to permit recovery."

We therefore submit that decision here as in the cases of *Johansen* v. *United States,* (2d Cir., decided July 30, 1951) *Mandel* v. *United States,* (3d Cir., decided August 16, 1951) and *Lewis* v. *United States,* (D. C. Cir., 1951) 190 F. 2d 22, should be based primarily upon the ground that, absent explicit statutory direction for double recovery or election, the rights under whatever system of compensation, leave and retirement benefits may be applicable is exclusive of any right of action against the United States in the exercise of whatever judicial remedy is available.

ARGUMENT

Introduction

The present case (No. 12,906) and its companion cases No. 13,054, *Allen* v. *United States,* and No. 13,057, *Gibbs* v. *United States,* present a common question of great general importance for the United States where death or injury of government personnel occurs in the performance of duty. Claimants on account of the death or injury of government personnel have two remedies—one a judicial remedy by suit under the Public Vessels, Suits in Admiralty or Tort Claims Acts, the other by claim for compensation under whatever statute applies to the particular employee, civil or military, who is involved. The question is whether compensation, when available, precludes recovery by suit.

This Court must thus decide whether to follow the minority view of the Fourth Circuit, adopted by the court below, that where civil rather than military employees are involved, the right to compensation is not preclusive of recovery against the United States by suit (*United States* v. *Marine,* (4th Cir., 1946) 155 F. 2d 456; *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120; *Mandel* v. *United States,* (E. D. Pa., 1947) 74 F. Supp. 754, reversed, 3d Cir., August 16, 1951) or whether to follow the majority rule that in the absence of any explicit statutory direction for double recovery or election there is no right of action against the United States for service-incident death or injury of government personnel and the sole right of recovery is under whatever compensation,

leave and retirement statutes are applicable (*Mandel* v. *United States,* (3d Cir.) decided August 16, 1951, reversing (E. D. Pa., 1947) 74 F. Supp. 754; *Lewis* v. *United States,* (D. C. Cir.) 190 F. 2d 22; *Johansen* v. *United States,* (2d Cir.) decided July 30, 1951; *Posey* v. *United States,* (5th Cir., 1937) 93 F. 2d 726).

The importance to the United States of this question of whether recovery by suit may be had for service-incident death and injury of civil as well as military personnel of the Army and Navy and of other security sensitive agencies extends far beyond the amount of the recovery and the nature of the forum in this or any other case. The manner of the deaths and injuries in the present cases appears to involve no matter of the functioning of defense installations on Army and Navy craft nor of the military decisions of the superiors of the Army and Navy personnel involved. But in many instances such matters are involved and in times of emergency the security of the nation imperatively requires that the manner and occasion of the service-incident death or injury of such employees, whether in the civil or the military service, be not litigated in the courts. The Supreme Court in *Feres* v. *United States,* (1950) 340 U. S. 135, already has held compensation exclusive where military employees are involved. But it is obvious that it is equally dangerous to litigate the correctness of the acts of their military superiors and the proper functioning of the defense installations involved whether the death or injury is that of a

civil or a military employee. And Congress, as yet, has only seen fit to redeclare the exclusiveness of compensation in respect of those civil employees who (a) are covered by the Federal Employees' Compensation Act, (b) are employed in shore-side positions, and (c) are injured after the enactment of the amendments of October 14, 1949. Thus, the right of recovery (1) of the civilian component of the crews of public vessels, (2) of the many civil employees covered by special compensation, leave and retirement systems other than the Federal Employees' Compensation Act, and (3) of all employees who, like those here, were injured before October 14, 1949, has, in effect, been reserved for final judicial consideration, eventually by the Supreme Court.

By the Tort Claims Act (28 U. S. C. 1346 (b)) and the Public Vessels and Suits in Admiralty Acts (46 U. S. C. 781–789, 741–752), Congress has provided jurisdiction for suit on all types of claims for death or injury. A judicial remedy thus exists for all claims for death or injury of government employees and recovery may be had by suit provided only that a right of action has been recognized or created. This Court, correctly in our view, held in *Thomason* v. *United States,* 184 F. 2d 105, and *United States* v. *Loyola,* 161 F. 2d 126, that the general grant of a remedy by the Public Vessels Act of suits "for damages caused by a public vessel" extends to all suits for damages, including those for death or injury and for wages and maintenance. It is the Government's position that the majority view is correct and that absent explicit statutory provision

for double recovery or election, no right of action has been created for service-incident death or injury of government personnel and thus, although the claimant has two *remedies,* only the compensation remedy can lead to any *recovery.*

The Government believes, however, that in addition to the absence of any right of action for death or injury of government personnel in the performance of duty, the United States has in the three cases now before this Court two additional defenses—(1) that the injuries sued for were due to the wrongful acts of fellow servants, and (2) that libelants by claiming awards or medical services under the Compensation Act are precluded from recovery.

The fellow servant rule appears fully dispositive of the present *Vatuone* case (No. 12,906) and of the *Gibbs* case (No. 13,057). In *Allen* (No. 13,034), however, appellant was a member of a crew and so immunized against the fellow servant rule by the Jones Act (46 U. S. C. 688). Vatuone and Gibbs were ship repairmen, however, and not crew members or longshoremen subject to that Act. A scrutiny of the Longshoremen's and Harborworkers Compensation Act (33 U. S. C. 905) and of the Federal Employers' Liability Act (45 U. S. C. 51, et seq.), made applicable to seamen by the Jones Act, makes it apparent that the fellow servant defense is abrogated only as to those employees covered by such Acts. The statutes abolishing the fellow servant rule are limited by the object of the legislation to those employers who are required to furnish compensation

or who are carriers; the abolition does not reach to employees who are beyond the ambit of the act. See e. g., *Price* v. *Railway Express Agency,* (1948) 322 Mass. 476, 479, 78 N. E. 2d 13, 16; *Southern Ry. Co.* v. *Taylor,* (D. C. Cir., 1926) 16 F. 2d 517, 522. It is settled that employers of personnel not included in the operation of such acts can avail themselves of the fellow servant defense. Thus Section 5 of the Harborworkers Act (33 U. S. C. 905), denying employers the benefit of the fellow servant defense for failure to secure compensation payments, does not apply because Section 3 (2) of that Act (33 U. S. C. 903) excludes employees of the United States from its coverage. Nor does state legislation abrogating the fellow servant defense apply. First, state law could not alter the uniformity of the maritime law which, except as altered by the Jones Act and the Harborworkers Act, applies the fellow servant rule.[4] And, second, in no event could state legislation alter or affect the employer-employee relationship established by federal law between the United States and its employees.[5]

The rule of preclusion by election appears equally dispositive of all three cases. In the *Vatuone* case

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[4] *Hammond Lumber Co.* v. *Sandin*, (9th Cir., 1927) 17 F. 2d 760, cert. den. 274 U. S. 756; *Carstensen* v. *Hammond Lumber Co.*, (9th Cir., 1926) 11 F. 2d 142; *Western Fuel Co.* v. *Garcia*, (9th Cir., 1919) 260 Fed. 839; *The Hoquiam*, (9th Cir., 1918) 253 Fed. 627; *Mallory SS Co.* v. *Simmons*, (5th Cir., 1924) 2 F. 2d 970. Boynton, "The Fellow Servant Rule in Admiralty," (1926) 1 Wash. L. Rev. 195.

[5] *United States* v. *Standard Oil Co.*, (1947) 332 U. S. 301, 305–311.

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the widow of an Army ship repairman filed claim for compensation for the death of her husband in the performance of duty, obtained an award and received checks thereunder. She could not by purporting to withdraw her claim, revoke her election. In the *Gibbs* case a Navy ship repairman injured in the performance of duty lost no pay, by reason of his rights to sick and annual leave, and suffered no loss of use of member or disfigurement so as to be entitled to schedule benefits, but accepted medical treatment as a beneficiary of the Compensation Act. In the *Allen* case a member of the civilian component of an Army Transport crew developed tuberculosis during the performance of duty, procured an award of compensation and is still collecting payments thereunder.

In our view each of these three libelants is precluded from litigating the broader question of whether, absent express statutory authorization for double recovery or election, their rights under the applicable compensation, leave and retirement statutes constitute their sole recovery for death or injury in the performance of duty. For the reasons more fully developed in Point IV of this brief (*infra,* pp. 61–64) we believe that "an election to take compensation under the statute as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto is disputed, or by accepting compensation or medical services * * * bars an action to recover damages" (71 Corp. Jur., p. 1488). Except for the decision of the court below,

and the decision of the Fourth Circuit in *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120, together with the dissenting opinion of Judge Frank in the *Johansen* case, applying a different rule to seamen because of their privileged status as wards of the admiralty judges, federal courts have uniformly held that claiming compensation precludes recovery by suit. See esp. *Hines* v. *Dahn,* (8th Cir., 1920) 267 Fed. 105, 114, quoted, *infra,* p. 48, fn. 16.

If the Government is correct, however, that the right to compensation, leave and retirement pay provides the sole recovery and there is no cause of action for service-incident death or injury of both civil and military employees alike, this Court, like those for the Second and Third Circuits in the *Johansen* and *Mandel* cases, need not reach the "election" question of whether libelants are precluded by claiming payments or medical services under the Compensation Act. We believe that an open-minded examination of the consequences of litigating the manner and cause of service-incident deaths and injuries, of the legislative history of the problem, and of the reasons given by the several courts for their divergent views, leaves no doubt that the majority view is correct and that absent an express statutory direction for double recovery or election the sole recovery for the death or injury of government employees in the performance of duty is under the particular compensation, leave and retirement statutes which apply.

We emphasize again that this question of the exclusiveness of compensation, leave, and retirement pay, as pointed out in the beginning, cannot involve any possible doubt as to the unquestioned existence of a jurisdictional remedy for death or injury and for seamen's wages or maintenance under the Public Vessels Act. The existence of such jurisdiction for death or injury was affirmed in *Dobson* v. *United States,* (2d Cir., 1928) 27 F. 2d 807, 808, cert. den. 278 U. S. 653, and has been followed ever since. *New England Maritime Co.* v. *United States,* (D. Mass., 1932) 55 F. 2d 674, 685, affirmed per curiam (1st Cir., 1934) 73 F. 2d 1016; *Canadian Aviator, Ltd.* v. *United States,* (1945) 324 U. S. 215. This Court, in line with the Government's views has extended its jurisdiction to seamen's wages and maintenance. *Thomason* v. *United States,* (9th Cir., 1950) 184 F. 2d 105; *United States* v. *Loyola,* (9th Cir., 1947) 161 F. 2d 126. But the grant of a judicial remedy does not mean that a right of recovery in the exercise of that jurisdiction was also created. Indeed it seems probable that, in view of the familiar general rule that "unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable,"[6] Congress expected that section 9 of the Public Vessels Act (46 U. S. C. 789), would be interpreted in accordance with its literal language as limiting the liability of the United States in suits

[6] *Mandel* v. *United States,* (3d Cir., 1951) — F. 2d —, —, reversing 74 F. Supp. 754; see 71 Corp. Jur., p. 1480; Prosser, *Torts,* (1941) p. 543; Schneider, *Workmen's Compensation Law,* (1941) § 147, p. 421, *passim* §§ 89–154.

brought under the jurisdictional grant to that of private employers similarly situated—and therefore as precluding recovery for service-incident death or injury since compensation was applicable.

In any event, as Justice Jackson observed concerning the problem in *Feres* v. *United States,* (1950) 340 U. S. 135, 140–141, the granting of a remedy by suit does not mean that recovery may be had. Jurisdiction is conferred to render judgment upon all claims for death or injury—

> * * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

For, as the court said in *Kuhnert* v. *United States,* (8th Cir., 1942) 127 F. 2d 824, 826, "We think that no court would be justified in interpreting an act of Congress as creating a new cause of action against, or imposing a new liability upon the United States unless the language of the act was clearly susceptible of no other reasonable construction." See also *Atchley* v. *Tennessee Valley Authority,* (N. D. Ala., 1947) 69 F. Supp. 952, 954.

We believe, therefore, that the admitted grant of a judicial remedy is not conclusive of the right of double recovery or election, but that, on the contrary,

if Congress had contemplated that the Public Vessels, Suits in Admiralty, and Tort Claims Acts would be held to apply to government personnel injured in the performance of duty, it would not have omitted any provision for adjusting the recovery. "The absence of any such adjustment is persuasive that there was no awareness that the act might be interpreted to permit recovery * * *" *Feres* v. *United States, supra,* 340 U. S. at 144.

I

Libelant has two remedies against the United States, but the decisions of four circuits establish that libelant's compensation rights preclude recovery by the exercise of the judicial remedy

The Government believes that absent an explicit Congressional direction for double recovery or election, the rights of government personnel under whatever compensation, leave and retirement statutes apply to employees of their particular class[7] are exclusive and preclude the creation of any cause of action for their injury or death in the per-

[7] In the Federal Employees' Compensation Act the inseparable interconnection of compensation, leave and retirement is particularly emphasized by the express provisions respecting the employees' right of election among the three. See respecting leave rights 5 U. S. C. 758; respecting retirement rights 5 U. S. C. 714. The connected character of compensation, leave and retirement is further emphasized by the provisions for military reservists on temporary active duty to elect between their rights under the military statutes and the FECA. See 5 U. S. C. 797–800; 10 U. S. C. 1711; 14 U. S. C. 311–312, 386; 34 U. S. C. 855 (c), 857 (e); 50 U. S. C. 1511.

formance of duty despite the existence of a judicial remedy for its enforcement if there were a cause of action. This view of the matter, applied to military service employees by the Supreme Court in *Feres* v. *United States,* (1950) 340 U. S. 135, has been applied equally to civil-service employees by the Courts of Appeals for the Second, Third, Fifth, and District of Columbia Circuits. *Mandel* v. *United States,* (3d Cir., decided August 16, 1951); *Johansen* v. *United States,* (2d Cir., decided July 30, 1951); *Lewis* v. *United States,* (D. C. Cir., 1951) 190 F. 2d 22; *Posey* v. *United States,* (5th Cir., 1937) 93 F. 2d 726. The Fourth Circuit alone has explicitly held the contrary. *United States* v. *Marine,* (4th Cir., 1946) 155 F. 2d 456, followed in *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120.

In *Mandel* v. *United States,* the Third Circuit, in a case like the present involving an army employee, was asked to follow the Fourth Circuit and apply a different rule where civil rather than military service employees of the United States were involved.[8] The

[8] The trial court in *Mandel* v. *United States,* (E. D. Pa., 1947) 74 F. Supp. 754, 755, had said, "Although for reasons peculiar to their status, members of the armed forces should be excluded from the waiver of sovereign immunity, a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government." It refused to find significance in the variation in the remedy which Congress had commanded in distinguishing between public-vessel civilian seamen, who are entitled to compensation, on the one hand, and private and WSA merchant seamen whom Congress, ratifying the previous decisions of the Comptroller General, has expressly excluded from compensation, on the other.

Court agreed with the Government in following Mr. Justice Jackson's pronouncement in *Feres* v. *United States,* (1950) 340 U. S. 135, 141, that the undoubted grant of a remedy under the various jurisdictional acts for claims for injury or death of every type of person does not without more, mean that Congress has created a cause of action against the United States for the injury or death of government personnel in the performance of duty. Judge Goodrich said (slip op. pp. 4–6):

> We are necessarily faced then with the general problem: May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained by the administrator of the decedent for the damages caused by his death. 46 U. S. C. A. § 761. We think there are several reasons why the Compensation Act should be held to be the exclusive measure of rights in this case.
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> 1. The first reason is the analogy to the rule under Workmen's Compensation Acts which are now an accepted and almost universal part of state legislation. It is the general rule that unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable, at least so far as rights against the employer are concerned. One must not generalize too widely from this rule because many of the statutes provide expressly that the remedy is exclusive. Nevertheless, we think the general rule represents the crystallization of the thought of both lawmakers and courts upon the subject. The Compensation Acts are in-

tended to provide a more humane, adequate and generally fair method of dealing with accidents incurred by employees in the course of employment than the former common-law rules of employers' liability. They are intended to do away with prolonged and expensive litigation with hard cases going uncompensated because of inability to show fault on the part of the employer. We think that in general the natural inference would be that the Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages.

2. The reliance on the Compensation Act alone will remove an element of unfairness otherwise present in the type of case represented here. * * * Those members of the armed forces injured while on active duty have such compensation and only such compensation as Congress has provided by the military pension and compensation laws. We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate. It would also discriminate against civilian seamen employed by the United States through the War Shipping Administration who are authorized to sue the United States for the tort but are excluded from the FECA by the War Shipping Administration (Clarification) Act of 1943, 50 U. S. C. A. App. § 1291.

In *Lewis* v. *United States,* the Court of Appeals for the District of Columbia Circuit, in a case involving a civilian park policeman, a civil service employee of the Interior Department, likewise refused to follow

the Fourth Circuit and draw a distinction between civil and military service employees or between employees under different systems of compensation, leave and retirement statutes. The District of Columbia Circuit referred to the fact that the compensation act applicable to the plaintiff in *Lewis* contained no language making it exclusive and said (190 F. 2d at pp. 22, 23, 24):

> The question of the Government's liability in tort has received a definitive answer with respect to the great body of Federal employees. They are covered by the Federal Employees' Compensation Act, which not only grants compensation benefits but also expressly forbids them from suing the Government for injuries received in the course of their duties. Congress has thus, in most instances, left no doubt as to its desire to limit Federal employees to their remedy under the Compensation Act and to preclude double recovery or an election of remedies. * * * [But] we think that whether or not the Act is applicable to appellant, this suit cannot be maintained.
>
> * * * * *
>
> The Supreme Court has recently had occasion to pass upon a case somewhat similar to the one now before us, a suit brought under the Federal Tort Claims Act by a member of the armed services injured on active duty through the negligence of another soldier, *Feres* v. *United States,* 340 U. S. 135. In concluding that such suits were not maintainable, Mr. Justice Jackson had this to say, among other things:

"The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.[9]

* * * * *

"This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services." (340 U. S. at 140, 141–42, 144.)

By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled "to all the benefits of relief and retirement" furnished by the "Policemen's and Firemen's Relief Fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way

[9] The District of Columbia Circuit might also have quoted in this connection the further passage from Supreme Court's opinion in *Feres*, that: "We cannot ignore the fact that most states have abolished the common law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability." (340 U. S. at 143.)

of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * * And in view of the general policy of Congress not to permit Federal employees to recover under the Tort Claims Act for injury at work, it certainly would seem unwarranted to permit members of the Park Police—uniquely among Federal employees—to maintain suits for damages, since the nature of their work and the benefits they receive suggest the contrary result. See *Dahn* v. *Davis,* 258 U. S. 421, 432; *Dobson* v. *United States,* 27 F. 2d 807.

Congress is the body which must ultimately pass on the question of the amount and sufficiency of the benefits to be received by the Park Police, or by any other group of Federal employees. Congress annually appropriates for their salaries and for the amounts to be contributed by the Federal Government under legislation providing for retirement pay and compensation for injuries. Congress can increase or reduce these amounts. It can grant new gratuities through private bill or general legislation. And "if we misinterpret the Act, at least Congress possesses a ready remedy." *Feres* v. *United States, supra,* at p. 138.

So in *Johansen* v. *United States,* the Second Circuit likewise rejected the Fourth Circuit view and held

that, without express statutory authorization for double recovery or election, no government employee, whether in the civil or the military service could recover by suit but all were equally precluded because they had no cause of action for injury in the performance of duty. The court said (slip op. pp. 1763–4):

> We need not decide whether the appellant is disabled from bringing this suit by an election to accept a compensation award; since, the government not having consented to be sued, that was his only remedy.
>
> * * * This case falls within the category to which *Bradey* v. *United States,* 2 Cir., 151 F. 2d 742, cert. denied 326 U. S. 795, belongs. We there held, following *Dobson* v. *United States,* 2 Cir., 27 F. 2d 807, cert. denied 278 U. S. 653, that a naval enlistee serving as a member of the crew of a public vessel was not permitted by the Public Vessels Act to sue the government for personal injuries received in line of duty, and that such injuries were compensable only under the special provisions of law applicable to naval personnel. * * * Similarly, in *Feres* v. *United States,* 2 Cir., 177 F. 2d 535, aff'd 340 U. S. 135, we held that an employee entitled to compensation as a member of the armed forces was precluded by that right from maintaining suit against the government under the Tort Claims Act for injuries received in line of duty.
>
> Since the appellant would have been limited to suit if he had been employed aboard a merchant vessel of the United States, and to compensation if a member of the military serv-

> ice, allowing him but one means of recovery will appropriately fit "into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole." *Feres* v. *United States,* 340 U. S. 135, 139.

Earlier in *Bradey* v. *United States,* (2d Cir., 1945) 151 Fed. 742, cert. den. 326 U. S. 795, the Second Circuit had held that the necessity of the War Shipping Administration (Clarification) Act confirmed this view that civil and military employees were precluded alike from suit by the absence of any cause of action. There the court had said (151 F. 2d at 743):

> This appears to us to show that Congress did not expect those in its service upon "public vessels" to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries. The compensation provided for the Navy is indeed not the same as that provided under the United States Employees' Compensation Act, 5 U. S. C. A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive; and the decree will be affirmed.

And, still earlier, the Fifth Circuit in *Posey* v. *Tennessee Valley Authority,* (5th Cir., 1938) 93 F. 2d 726, 728, had said:

> * * * This compensation is the sole remedy ordinarily available to an injured employee

> of the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it so intended. The inconvenience, uncertainty, and consequent litigation that would at once arise if the laws of each state in which the employee might work should apply must have been foreseen. * * *[10]

Despite the minority view of the Fourth Circuit, we believe the crux of the problem is that every indication points toward the absence of any Congressional intention to create a new cause of action in addition to the various systems of compensation, leave and retirement statutes which apply to the different groups of civil and military employees. In short, as stated by Justice Jackson in *Feres* v. *United States,* (1950) 340 U. S. 135, 144:

> This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability

[10] Accord, *Humphrey* v. *Poss*, (1943) 245 Ala. 11, 15 So. 2d 732; *Breeding* v. *T. V. A.*, (1942) 243 Ala. 240, 9 So. 2d 6.

> with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. *The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.* [Emphasis supplied.]

We submit that this unanimity of decision by four circuits should be accepted as controlling in the three cases now at bar. It is dispositive of every contention which can be presented in these present cases. It settles that in every case, unless Congress has in express terms provided for double recovery or election, all government personnel of whatever type, and their dependents, cannot by suit against the United States recover for service-incident injury and death but are limited exclusively to their recovery under the particular compensation, leave and retirement statutes applicable to personnel of their type. However, since there have been differences of opinion in another court of appeals, the remainder of our argument will seek to emphasize the correctness of the majority holding and the absence of any reason for this Court to depart from it.

II

The grant of a judicial remedy by suit for injury and death of government employees did not create a new additional cause of action where rights already existed under applicable systems of compensation, leave and retirement statutes

There can be no question but that Congress by the Public Vessels, Suits in Admiralty and Tort Claims Acts has given a judicial remedy in the district courts for suits for injury and death of all kinds, including service-incident injury and death of government personnel. As the court observed in *Mandel,* if rights of action exist despite the availability of compensation, "we assume an action to enforce them could be maintained" (slip op. p. 4). So Justice Jackson in *Feres* v. *United States,* (1950) 340 U. S. 135, 141, explained that Congress had conferred jurisdiction on the courts generally to render judgment upon all claims—

> * * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

Indeed, it is familiar and long settled that Congress by providing a remedy by suit against the United States does not thereby recognize or create rights of action. Thus, the court well said in *Kuhnert* v.

United States, (8th Cir., 1942) 127 F. 2d 824, 826, "We think that no court would be justified in interpreting an act of Congress as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction." See also *Atchley* v. *Tennessee Valley Authority,* (N. D. Ala., 1947) 69 F. Supp. 952, 954.

This had been the Government's view in all the "compensation cases" and explains the cases from which our opponent's attempt to draw support because they were dismissed on the merits, correctly in our view, rather than for want of jurisdiction. Thus, in *United States* v. *Loyola,* (9th Cir., 1947) 161 F. 2d 126, which our opponents cite as contrary to the Government's position, we argued successfully that the court had jurisdiction under the Public Vessels Act, but that libelant had no cause of action against the United States for maintenance both because he had refused government hospitalization and medical treatment and also because, although he forfeited all right to compensation payments during such refusal, still his fundamental right to compensation precluded recovery.[11] Thus, contrary to our opponent's view, in

[11] The Government's brief in *Loyola* conceded (p. 17), "despite compensation and pension acts, *jurisdiction* continues unabated under any applicable jurisdictional acts" but argued "the exclusive remedy of the compensation or pension act" still bars "recovery in a suit under the jurisdictional act." So in *Johnson* v. *United States*, (4th Cir., 1950) 186 F. 2d 120, the Government's brief (p. 12) stated "in cases involving injuries sustained in the performance of duty by public vessel crew members, whether they be in the military or civil service, although *jurisdiction to bring* the

Loyola this Court upheld the Government's position that libelant, having refused the medical treatment tendered by the Government, lost both his right to claim maintenance as well as his right to claim compensation. The court therefore, equally correctly in our view, had no occasion to reach the problem of whether or not libelant, having forfeited his right to receive compensation benefits, might no longer be precluded by his former right to compensation but might in the special circumstances have a right of recovery by suit.

Our consistent position, that a remedy exists under the Public Vessels Act for every kind of suit for damages but is not conclusive of the existence of a cause of action in the libelant, was expressly adopted by *Thomason* v. *United States,* (9th Cir., 1949) 184 F. 2d 105, and *Jentry* v. *United States,* (S. D. Calif., 1947) 73 F. Supp. 899, further proceedings 1951 A. M. C. 1203, as well as in the *Loyola* case, 161 F. 2d at 127. In all three cases the libelant's suits, correctly in our view, were dismissed *on the merits* for lack of any right of action, *not for want of jurisdiction.*[12]

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suit exists, *recovery* cannot be had when the public vessel crew members are entitled to receive payments of compensation or pension benefits."

[12] Cf. *Thomason* v. *W. P. A.*, (D. Idaho, 1942) 47 F. Supp. 51, 54, aff'd (9th Cir., 1943) 138 F. 2d 343. State decisions confirm this view. The defense that compensation is applicable and exclusive is not absence of jurisdiction in the court, for the court has jurisdiction of all torts, but lack of any right of action in the plaintiff. Accordingly, unless the right to compensation appears on the face of plaintiff's pleading, the matter must be presented by plea or answer, not by demurrer, exceptions, or motion to dismiss and the

But this distinction between the absence of a cause of action and a lack of jurisdiction has been often disregarded by the courts. Indeed, many cases which were rested in part on absence of "jurisdiction" (and which the Government's opponents now contend were overruled when the Supreme Court finally settled, in accordance with every prior decision and with the statute's plain terms, that *jurisdiction* under the Public Vessels Act extends to all cases of death and injury caused by a public vessel) are explained by the obvious disregard of this distinction and, upon examination, continue to be as valid as before. On this basis cases like *O'Neal* v. *United States,* (E. D. N. Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871 (cf. *Haselden* v. *United States,* (E. D. N. Y., 1927) 24 F. 2d 529, 530, aff'd *sub nom. Dobson* v. *United States,* (2d Cir., 1928) 27 F. 2d 807, cert. den. 278 U. S. 653), in which dismissal seems to be placed by the court on lack of jurisdiction instead of on the merits, become easily understandable.[13] Courts have only limited

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burden is on the employer to establish the applicability of the statute to the death or injury in suit. 58 Am. Jur. p. 615; 71 Corp. Jur. pp. 1500, 1502. *Hogan v. Buja*, (E. D. La., 1920) 262 Fed. 224; *Kemper* v. *Gluck*, (1931) 327 Mo. 773, 39 S. W. 2d 330, cert. den. 284 U. S. 649; *Beveridge* v. *Illinois Fuel Co.*, (1918) 283 Ill. 31, 119 N. E. 46, 47; *Noble* v. *Detroit Taxicab & Trf. Co.*, (1923) 222 Mich. 414, 192 N. W. 709, 710; *Jirout* v. *Gebelein*, (1923) 142 Md. 692, 121 Atl. 831.

[13] Thus, in *O'Neal*, a member of the crew of a coast guard boat, then entitled to compensation under the Federal Employees' Compensation Act, sued for injuries and the district court said (11 F. 2d 869), "To construe this act as applying to seamen injured on a government-owned vessel, it seems to me would be contrary to the well-established policy of the government, which has created the United States Employees' Compensation Commission to meet such

jurisdiction where suits against the United States are concerned, just as they have only a limited jurisdiction of suits in admiralty. Judges therefore often say there is no jurisdiction of libelant's claim when what is meant is really that the claim stated in the libel does not constitute a cause of action in respect of which suit can be maintained. Of this problem Mr. Justice Holmes long ago observed in *The Ira M. Hedges,* (1910) 218 U. S. 264, 270:

> There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits. *Fauntleroy*

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conditions, and provided for the payment of compensation to its injured employees. * * * Of course, it is true, as urged by libelant, that, in actions in rem against the ship for injuries received by those on board, such injuries are charged to the ship; but to my mind Congress by this enactment [the Public Vessels Act] clearly did not intend to overturn the government's established policy, and permit its employees to bring actions for damages received on government ships in the course of their employment, * * *" Cf. *Lopez* v. *United States*, (S. D. N. Y., 1944) 59 F. Supp. 831, where a member of the civilian component of the crew of the Army Hospital Ship *Seminole*, entitled to compensation under the Federal Employees' Compensation Act, brought suit, the Government answered he was precluded from suing by his right to compensation, libelant excepted, and the Government's answer was upheld, the court declaring (p. 832), "respondent alleges more particularly that the libelant was an employee of the United States Army Transportation Corps. If the government substantiates its first allegation, then this paragraph is proper to show that libelant is relegated to his rights under the United States Employees' Compensation Act, 5 U. S. C. A. § 751 et seq. There is no allegation in the libel that the libelant was employed by 'the United States through the War Shipping Administration,' and hence he has no cause of action against the United States under Public Law 17, 78th Congress, 50 U. S. C. A. Appendix, § 1291, his only other remedy against the government."

> v. *Lum,* 210 U. S. 230, 235, and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce.

We believe, therefore, that whether the opinions say that libelant has "no cause of action" or is "precluded from suit," and accordingly dismiss on the merits, or whether they say that there is "no jurisdiction" and dismiss on that ground, the cases are all of equal authority against the right of recovery for service incident injury or death. All equally establish that unless Congress has in explicit statutory terms directed that there shall be double recovery or election, government personnel and their dependents cannot recover by suit for injury or death in the performance of duty but are limited to their recovery under the applicable compensation, leave and retirement acts.

III

The plain language of the Compensation Act as enacted in 1916 clearly contemplates that compensation shall be paid in every case and is exclusive; the 1949 amendments are only declaratory and made no change

Before the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, no general compensation law existed for civil as contrasted with military service crew members of government vessels nor for civil employees as a class. The prior Acts of May 30, 1908, c. 236, 35 Stat. 556, and March 11,

1912, c. 57, 37 Stat. 74, applied to only certain workers in navy yards, arsenals, construction projects, and a few other especially hazardous occupations. The hearings and committee reports on the bill which became the 1916 Act constantly emphasize the absence of any right of recovery for the majority of government workers against their employer, the United States, except by means of private relief bills. Heavy emphasis was placed on the importance of relieving Congress of this burden of private legislation.[14]

In 1916 there was no jurisdictional remedy available to a civil service crew member or other government employee by which to assert a cause of action against the United States for tort. Moreover, if there were jurisdiction he would have been barred by the fellow servant rule. But to the extent that there could be any claim against the United States, the language employed by the draftsmen of the 1916 Act shows that compensation was to be compulsory and exclusive of any other right of action against the United States. The act provided in Section 1 that the United States "*shall* pay compensation for disability and death of an employee resulting from a personal injury sustained in the performance of duty." The Act is mandatory on both sides. No election by the employee in accepting nor any choice by the Government about

[14] 64th Cong., 1st Sess., House Judiciary Committee, Hearings on H. R. 15315 (esp. pp. 5, 11) and H. Rep. 678 (esp. p. 8). Other reports and documents relating to the compensation bills are H. Doc. 1135, 63d Cong., 2d Sess.; H. Rep. 561, 63d Cong., 2d Sess.; S. Rep. 733, 64th Cong., 1st Sess.; H. Rep. 1195, 64th Cong., 1st Sess.

paying is permitted. The Act provided in Section 7 that, except for earned wages and military pensions, the liability of the United States for compensation should be exclusive of "any salary, pay, or remuneration whatsoever." Thus, while the 1916 draftsmen may not have so written the Act as to provide against every future contention that the grant of a jurisdictional remedy against the United States impliedly recognized or created new rights of action and imposed new liabilities on the Government, the intention is clearly stated that compensation was to be exclusive of all other rights against, and every other liability of, the United States for injury or death in the performance of duty.

When originally enacted in 1916 and so far as relevant when this case arose, the full text of the pertinent sections of the Act of September 7, 1916, c. 458, 39 Stat. 742, provided:

> [Sec. 1.] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty * * *
>
> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except

> pensions for service in the Army or Navy of the United States.

No change relevant to the present cases has been since made, for the only amendment has no bearing upon cases involving crew members or ordinary civil employees but only on those entitled to elect between military and the more generous FECA benefits.

As might be expected, two courts have read the language itself of the 1916 Act as declaring that compensation was exclusive. The latest such declaration that, despite the existence of a remedy by suit against the United States, the 1916 Act is by its plain terms exclusive of any cause of action for damages for injury or death in the performance of duty was made by the Second Circuit in *Feres* v. *United States* (2d Cir., 1949), 177 F. 2d 535, aff'd 340 U. S. 135. That was a case involving the effect on recovery by a soldier of his rights to compensation, leave and retirement under the statutes applicable to government employees of the military service. The soldier contended that his compensation rights could not exclude recovery of damages at law because (like the Public Vessels and Suits in Admiralty Acts involved here) the Tort Claims Act, which provided him the jurisdictional remedy there involved, had omitted to provide any exception expressly denying its jurisdictional remedy in those cases where a right to compensation also existed. Early drafts of the bill had included such an express exception of cases where compensation under the Federal Employees' Compensation Act and the Veterans Act was available. The soldier argued that

the omission showed the grant of the judicial remedy recognized or created a right of action in the exercise of the jurisdiction. In rejecting this view, the court said (p. 537):

> This exception was omitted in the Act as finally passed. However, the Federal Employees' Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States * * *" 5 U. S. C. A. § 757. * * * Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary.[15]

Admittedly this declaration by the Second Circuit that the Federal Employees' Compensation Act is exclusive by its own terms despite the existence of a judicial remedy is only dictum. But, we submit, it was well considered, was very closely related to the matter decided and only followed the earlier declaration by

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[15] In fact the Admiralty and Shipping Section of the Department of Justice had made strong representations against the exception. No such exception existed in the Public Vessels and Suits in Admiralty Acts and it was feared that its insertion in the Tort Claims Act might lead to the overruling of *Lopez* v. *United States* (S. D. N. Y., 1944), 59 F. Supp. 831 and *O'Neal* v. *United States* (E. D. N. Y., 1925), 11 F. 2d 869, aff'd *per cur.* (2d Cir., 1926) 11 F. 2d 871, which had held the benefits of the FECA exclusive in suits under the Public Vessels and Suits in Admiralty Acts.

the Supreme Court that the 1916 Act was by its terms exclusive.

The Supreme Court had early reached the same view. The Court's declaration that the 1916 Act is by its own terms exclusive of any right of action for damages for service-incident injury or death despite the existence of a judicial remedy under a jurisdictional statute is found in *Dahn* v. *Davis,* (1922) 258 U. S. 421, aff'g *Hines* v. *Dahn,* (8th Cir., 1920) 267 Fed. 105. There the Court quoted the provisions of the Compensation Act and explained them, as the Second Circuit did later, as meaning that while there were two *remedies* the sole *recovery* was under the Compensation Act, observing (p. 429) that, "it would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided in the Act" and construing the language of the whole act as evidencing (p. 430) "the disposition to treat the compensation provided for as adequate for the injuries received" and negativing the existence of any other rights against the United States therefor.

In *Dahn's* case, a railway mail clerk employed by the Post Office Department was injured in the performance of duty by the negligence of the Illinois Central Railroad Company. His widow obtained an award under the Federal Employees' Compensation Act. Suit was then brought against the railroad and the Director General of Railroads. Plaintiff pointed out that by virtue of Section 10 of the Federal (Railroad) Control Act of March 21, 1918, c. 25, 40 Stat.

451, no defense was to be made by the Director on the ground that the railroad was an agency of the Government. Plaintiff argued that this made the Director for compensation purposes a third party tort-feasor the same as a private carrier. The Eighth Circuit rejected this contention. It held, however, that although he had two remedies—one judicial, the other administrative—plaintiff was precluded from recovery because (like libelants in the cases now at bar) she had claimed compensation and the administrative claim was not disallowed.[16]

On certiorari the Supreme Court agreed with the decision below that while plaintiff had two *remedies,* one by suit and one by claim for compensation (258 U. S. at 428), he was *precluded from any recovery* in the exercise of his judicial remedy. Unlike the Circuit Court, however, the Supreme Court rested its

[16] The Eighth Circuit said (267 Fed. at 114): "* * * We are of the opinion that as to the United States the act in question is compulsory, if the employe gives the notice and files the claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employe as to whether he will make a claim under the act or not. If he does not, in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employe elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive. * * *"

decision as to preclusion not alone upon the single ground of "election," but upon the double ground (258 U. S. at 432) of first, "the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final" and, *second,* "because the petitioner elected to pursue to payment the remedy given him thereunder."

In commenting on section 7, which provides that while in receipt of compensation a Federal employee shall not receive any other "remuneration" from the United States, the Supreme Court said (p. 429):

> Section 7 of the act specifically declares that so long as any employee is receiving installment payments under the act, or if he has been paid a lump sum in commutation of installment payments, then until the expiration of the period during which installment payments would have continued, "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed," and except pensions for service in the Army or Navy.
>
> *It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act.* [Emphasis supplied.]

And in commenting upon Sections 26 and 27, respecting election in suits against third party tort feasors, the Court further observed (p. 430):

> Plainly, by these two sections Congress deals with the liability of persons *"other than the*

> *United States"* to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. *The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.* [Emphasis supplied.]

The existence of *two remedies,* one by suit, the other by claim for compensation, is in entire accord with the Court's holding that *recovery was precluded* both because the statute expressly declared "that no payment would be made * * * other than as provided for in the Act" and emphasized "the disposition to treat the compensation provided for as adequate" and also because plaintiff had "elected." The existence of a *remedy* by suit is not, of course, conclusive of a right of *recovery* in the exercise of such remedy. As Justice Jackson explained in respect of the similar existence of a remedy by suit in *Feres* v. *United States,* (1950) 340 U. S. 135, 141, a remedy is granted:

> * * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in

> exercise of their jurisdiction, to determine whether any claim is recognizable in law (p. 141).

And the existence of a right to compensation precludes the existence of any other right recognizable in the exercise of claimant's remedy by suit.

When the 1949 amendments to the Federal Employees' Compensation Act were adopted by the Act of October 14, 1949, c. 691, 63 Stat. 854, they did not modify and were not intended to modify the pre-existing exclusiveness of compensation benefits where available. On the contrary, it was expressly stated that Congress was not legislating upon "certain claims and denials of a right of election of remedies under existing laws" (see *infra,* pp. 55–57), but was leaving that question for resolution by the courts.

Following *Dahn* v. *Davis, supra,* in 1922, the courts were unanimous until 1946 in holding compensation benefits under the Federal Employees' Compensation Act to be exclusive.[17] But in *United States* v. *Marine,* (4th Cir., 1946) 155 F. 2d 456, and *Mandel* v. *United States,* (E. D. Pa., 1947) 74 F. Supp. 754 (since reversed on August 16, 1951), a conflicting opinion was expressed. But the record in *Marine* did not establish that the libelant was entitled to an award of compensation and the Department of Justice concluded

[17] *O'Neal* v. *United States*, (E. D. N. Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871; *Posey* v. *T. V. A.*, (5th Cir., 1937) 93 F. 2d 726, *Thomason* v. *W. P. A.*, (D. Idaho, 1942) 47 F. Supp. 51, 54, aff'd (9th Cir., 1943) 138 F. 2d 342; *Lopez* v. *United States*, (S. D. N. Y., 1944) 59 F. Supp. 831; *White* v. *T. V. A.*, (D. Tenn., 1945) 58 F. Supp. 776.

that it would not justify application for certiorari. Instead, the Department and the Compensation Bureau determined to seek a declaratory amendment making section 7 of the act (5 U. S. C. 757) announce in express terms the old pre-1946 rule of exclusiveness of compensation benefits where available.[18]

Since the merchant seamen of WSA/Maritime Commission vessels were already allowed recovery by suit but were expressly excluded from compensation benefits by the Clarification Act, while it was inconceivable that the armed forces civilian seamen often serving in the presence of the enemy could be given a right of action against the United States for tort, it was not thought that seamen's status could be in any wise affected by the compensation act amendments and the question was not raised at the hearings.[19] The bill,

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[18] After the decision to seek legislation rather than certiorari was taken, the Tenth Circuit chose to follow the *Marine* rather than the *Posey* case and rest decision on estoppel by acceptance of benefits. *Parr* v. *United States*, (10 Cir., 1949) 172 F. 2d 462. Meanwhile the lower court's opinion in the *Mandel* case, since reversed by this court, was followed in the Northern District of California. *Henz* v. *United States*, 1950 A. M. C. 714; *Sims* v. *United States*, 1950 A. M. C. 714; *Banks* v. *United States*, 1950 A. M. C. 1400; *Gibbs* v. *United States*, 94 F. Supp. 586; *Wright* v. *United States*, 95 F. Supp. 77.

[19] It should be remembered that the Clarification Act itself had been only declaratory of the pre-existing law that the exclusive remedy of merchant seamen on vessels operated by the Shipping Board/Maritime Commission/War Shipping Administration was by suit under the Suits in Admiralty Act without any right under the FECA. See cases collected in *Gibbs* v. *United States*, (N. D. Calif., 1950) 94 F. Supp. 586, 589, fn. 9, and referred to by the Third Circuit in *Mandel*, footnote 15. The Attorney General after first holding such seamen not entitled to compensation had reversed himself. Cf. 34 Ops. A. G. 363 with 34 ibid. 120. But the

including the express declaration of existing law as to the exclusiveness of compensation where available, passed the House and was favorably reported in the Senate by the Committee on Labor and Public Wel-

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Comptroller General, whose views control the payment of money, declined to follow and adhered throughout to his original view that the Suits in Admiralty Act provided such seamen their exclusive remedy. Thus, following the decision in the *Lustgarten* case (*Johnson* v. *United States Fleet Corp.*, (1930) 280 U. S. 320), he reaffirmed his view, citing that case and declaring (Decision A–31684, September 10, 1930) : "While the Employees' Compensation Act was not mentioned nor considered, the conclusion seems justified that the remedy available to a member of a crew of a merchant vessel owned by the United States and operated by or for the Merchant Fleet Corporation, to recover for injury sustained during employment, is also, exclusive of any right or remedy under the Employees' Compensation Act. * * * Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for operation of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is believed reasonable to conclude that, under existing law, the Employees' Compensation Commission may not entertain, settle, or pay any claims under the Employees' Compensation Act by or on behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as a result of such injuries sustained in the course of their employment on such vessels." Until 1943, however, the insurance carriers on these government merchant vessels commonly offered their crew members voluntarily settlement on the basis of the compensation benefits under the FECA to which they would have been entitled if employed on army and navy vessels. See e. g. *Hillenbrand* v. *United States*, 1929 A. M. C. 885; *Stewart* v. *United States*, (E. D. La., 1928) 25 F. 2d 869. This was in full accord with the similar voluntary practice of insurance carriers on private commercial vessels. See e. g. *Bay State Dredging Co.* v. *Porter*, (1st Cir., 1946) 153 F. 2d 827; *In re Panama Transport Co.*, (S. D. N. Y. 1951) 98 F. Supp. 114, 117.

fare, which explained the need for the declaratory amendment, saying (S. Rep. 836, 81st Cong., 1st Sess., p. 23):

> Workman's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. * * * This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities.

But the seamen's unions became apprehensive that the declaratory amendment might alter the existing law respecting merchant seamen and thereby bring them under compensation. It was accordingly agreed that the text of the declaratory amendment in the bill as passed by the House should be further amended so as to make it absolutely plain beyond question that no change was being made in the existing law relating to either merchant or to army and navy civilian seamen. See the Third Circuit's *Mandel* opinion, foot-

note 8; *Johansen* v. *United States,* (S. D. N. Y.) 1951 A. M. C. 117, aff'd (2d Cir.) July 30, 1951.

Senator Douglas, in charge of the bill, explained his reasons for accepting these precautionary amendments designed to make sure that the prior status of seamen was preserved. He stated (95 Cong. Rec. 13609):

> Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. *The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.*
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> * * * * *
>
> It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act [i. e., army and navy public vessel seamen covered by compensation as opposed to merchant seamen excluded from compensation by the decisions of the Comptroller General and the Clarification Act.] For the same reason, namely, that we have had no hearings on the matter, *we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws,* which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen

> have such an election. [Italics and matter in brackets supplied.]

It is thus abundantly clear that those in charge of the bill meant to continue the distinction, as previously recognized by the majority of courts, between crew members of army and navy vessels suing under the Public Vessels Act and WSA/Maritime merchant seamen entitled to sue under the Suits in Admiralty Act but occasionally said to be suing under the Public Vessels Act.[20]

It is equally clear that those urging the floor amendment did not intend to alter the rights of army and navy civil service crew members. Their perfectly reasonable intent was to make sure that the merchant seamen, who had been excluded from compensation coverage by the Comptroller General and the Clarification Act, were not brought under the compensation act by implication. Thus, Senator Morse, in presenting the floor amendments represented to the Senate (95 Cong. Rec. 13607):

> Mr. President, I understand the Senator from Illinois is willing to accept the amendment. *In effect it continues the seamen in exactly the same legal position which they presently enjoy.*
>
> This matter was fought out in 1941 when an attempt was made to bring the seamen under

[20] See e. g., *Krey* v. *United States*, (2d Cir., 1941) 123 F. 2d 1008, where the opinion states jurisdiction was under the Public Vessels Act. The file papers show, however, that the vessel was operated for the Maritime Commission, the libel (Article 10) invoked jurisdiction under the Suits in Admiralty Act and the answer admitted it.

the act, and it was defeated at that time.[21] This amendment continues the historical legal pattern, as far as the seamen are concerned, in respect to workmen's compensation rights. *All my amendment does, in effect, is to leave the seamen exactly in the position in which they now are* in respect to their legal rights to compensation, giving them, under admiralty law, the right to sue for their compensation. [Italics supplied.]

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[21] The Government believes Senator Morse here refers not to the coverage by the Federal Employees' Compensation Act of civil service crew members of army and navy vessels for they had been under compensation since 1916 and any other treatment of them would be incompatible both with their own interests and the national security, but to the attempt to bring private merchant seamen on commercial vessels under the Longshoremen's Act. See Senate Committee on Commerce, Hearings on H. R. 6881, 76th Cong., 3d Sess. On September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for privately employed seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess.; 86 Cong. Rec. 12002. The agencies' report was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess.; 87 Cong. Rec. 7434. The change was vehemently opposed by the seamen's unions and no further action was taken. In 1926 the proposal to include private merchant seamen in the coverage of the Longshoremen's Act followed the same course. The bill originally reported in the House included seamen, that in the Senate did not. S. Rep. 973, 69th Cong., 1st sess. The Senate bill passed first but the House substituted its bill. H. Rep. 1767, 69th Cong., 2d sess. The seamen's representatives succeeded in having them excluded. 68 Cong. Rec. 5402–3, 5411, 5414, 5908. The hearings are illuminating. 69th Cong., 1st sess., Senate Judiciary Committee, hearings on S. 3170 (March 16, April 2, 1926); House Judiciary Committee, hearings on H. R. 9498 (April 8, 15, 22, 1926), hearings on S. 3170 (June 29, 1926).

Senator Magnuson similarly observed of the floor amendment (95 Cong. Rec. 13607):

> * * * What it does, of course, as the Senator from Oregon has said, is to leave the seamen in their tort right of compensation just as they are now without placing them under the act.

It is thus plain, as was held by the Third Circuit in *Mandel* and the District Court in *Johansen* (see *supra,* p. 54), that Congress, including even the congressional proponents of the floor amendment, meant only to preserve the prior status of all seamen—army and navy seamen with their exclusive right of compensation, WSA/Maritime Commission merchant seamen with their exclusive right of suit.

Congress was not "seeking to legislate affirmatively" and did not intend, without hearing the representatives of the army and navy, to change the existing law or affirmatively adopt into law the view of the lower court in *Mandel* v. *United States,* 74 F. Supp. 754 (since reversed by Third Circuit on August 16, 1951, as well as rejected by the Second Circuit in *Johansen* v. *United States,* decided July 30, 1951), that recovery for death or injury of members of the civil service component of the crew of army and navy vessels was thenceforth to be allowed recovery by suit. In accordance with the demand of the seamen's representatives, the question was left undisturbed by the Congress with the intention that the point should first be litigated in the Supreme Court.

It results that the 1949 amendments made no change in the 1916 law and that, as declared by the Second

Circuit in *Feres* and by the Supreme Court in *Dahn,* where compensation benefits are available under the Federal Employees' Compensation Act, as they are in the case of army and navy crew members, they are exclusive of any right of recovery in suits against the United States in the exercise of whatever judicial remedy is available.

IV

Unless compensation is exclusive where available, insolvable difficulties in respect of double recovery or election are produced; it is impossible to distinguish between civil and military employees

The omission of Congress to make any express provision regarding double recovery or election confirms the view of the Second Circuit in *Feres* (*supra,* pp. 23–25) and of the Supreme Court in *Dahn* (*supra,* pp. 25–29) that when read together the various provisions of the Federal Employees' Compensation Act "emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U. S. at 430). The difficulties of harmonizing a right of recovery by suit under whatever judicial remedy is available with the compulsory duty imposed on the Government by section 1 of the Act to pay compensation in all events is too obvious to have been overlooked by Congress. It has long been familiar, as the Third Circuit pointed out in *Mandel* (slip opinion, p. 5, footnote 9) that "Unless the statute otherwise provides, the remedies afforded by the workmen's

compensation act are exclusive" (71 Corp. Jur. § 1488, p. 1480).

The Supreme Court in *Feres* v. *United States,* (1950) 340 U. S. 135, gave controlling weight to this absence of express statutory direction by Congress. It said (p. 144):

> This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death or those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

We believe that the identity of the problem presented, whether the disability benefits are under the civil or the military service statutes, indicates that an identical intention would have existed on the part of Congress in respect of civil and military employees alike.

The necessity for reaching an identical conclusion whether civil or military service personnel is involved is further reenforced by the right of military reservists on temporary active duty to elect between benefits under the military compensation statutes and the usually more favorable Federal Employees' Compensation Act benefits.[22] The absurd results of the Fourth Circuit view are at once obvious. The rule of the *Feres* case can be entirely avoided. If claimant elects the smaller military benefits [23] he is confined to them by *Feres,* but if he elects benefits under the Federal Employees' Compensation Act he may first obtain an award and then reject the payments and recover by suit under the Public Vessels, Suits in Admiralty, or Tort Claims Acts.

The dispositive character of the absence of Congressional authorization for double recovery or election which the Supreme Court relied on in *Feres* is fully demonstrated when the cases trying to apply the "election" rule are examined. Where crew members are involved, the problem of election is complicated

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[22] See sec. 7 (5 U. S. C. 757), proviso to para. (a) as added by Act of July 1, 1944, c. 373, 58 Stat. 712, and the various statutory provisions cited in footnote 7, *supra*, p. 26.

[23] A wife and one child is entitled to $78 in the event of the service-incident death of a soldier regardless of rank (38 C. F. R. 1946 Supp. § 35.06, p. 5913). In addition the widow receives the six months death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903). Under the F. E. C. A. a wife and one child receive 55 percent of decedent's pay taken at not less than $150 per month. In the present case Mrs. Vatuone would receive $137.28 per month. In the *Mandel* case the benefits for the widow and child were $226.41 per month.

by the seamen's enjoyment of special privileges as wards of the admiralty judges. Thus, it has been held that even collection of cash benefits by a seaman does not preclude him from recovery by suit. *Johnson* v. *United States,* (4th Cir., 1950) 186 F. 2d 120; *Bay State Dredging Co.* v. *Porter,* (1st Cir., 1946) 153 F. 2d 827; cf. *Garrett* v. *Moore-McCormack Co.,* (1942) 317 U. S. 329; *Muruaga* v. *United States,* (2d Cir., 1949) 172 F. 2d 318. District courts, however, have held the contrary. *Wright* v. *United States,* (N. D. Calif., 1950) 95 F. Supp. 77; *Banks* v. *United States,* (N. D. Calif.) 1950 A. M. C. 1400; *Frader* v. *United States,* (S. D. N. Y., 1950) 91 F. Supp. 657; *Johansen* v. *United States,* (S. D. N. Y.) 1951 A. M. C. 117, aff'd (2d Cir.) July 30, 1951.

Where shoreside employees are involved, however, the general rule is as stated in 71 Corpus Juris, p. 1488:

> An election to take compensation under the statute as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto disputed, or by accepting medical services * * * bars an action to recover damages.

Thus in *Hines* v. *Dahn,* (8th Cir., 1920) 267 Fed. 105, 114, aff'd *sub nom. Dahn* v. *Davis,* (1922) 258 U. S. 421, it was stated that the making of the award even without its collection precluded suit.[25] The same rule

[25] This appears to stem from the fact that where the United States is concerned, mere delivery of a check is a binding payment without cashing it. See *Beers* v. *Social Security Administrator,* (D. Conn., 1948) 80 F. Supp. 183, aff'd (2d Cir., 1949) 172 F. 2d

was recently followed in *Ocasio* v. *United States,* (D. Puerto Rico) 1951 A. M. C. 1297. Sate courts have similarly held that when a claim for compensation is adjudicated the award acts as res judicata and estops the claimant from refusing the payment and bringing suit. *Nyland* v. *Northern Packing Co.,* (1928) 56 N. D. 624, 218 N. W. 869; *Sotonyi* v. *Detroit City Gas Co.,* (1930) 251 Mich. 393, 232 N. W. 201.[26] Even acceptance of medical benefits is held to constitute an election *Gibbs* v. *United States,* (N. D. Calif.) 1951 A. M. C. 487; *Mains* v. *J. E. Harris Co.,* (1938) 119 W. Va. 730, 197 S. E. 10, 12; *Hlas* v. *Quaker Oats Co.,* (1930) 211 Iowa 348, 233 N. W. 514. Indeed in *Talge Mahogany Co.* v. *Burrows,* (1921) 191 Ind. 167, 130 N. E. 865, 873, the court said:

> It is not the law that a person who has done an act, with full knowledge of all material facts, can avoid the consequences annexed by law to such act, by alleging and testifying that when he did it he was not advised that the law gave him a choice between that course and a different one, and that he afterward learned that the law was and chose the different course.

34; *Anthony P. Miller, Inc.* v. *C. I. R.,* (2d Cir., 1947) 164 F. 2d 268, 269; "It is common to speak of 'paying' an obligation by giving one's check for it." Delivery fully perfected the election made in filing claim. Where the Government is concerned no question of collectibility can be involved and the Government's promise in the check differs in no respect from its promise in its regular paper currency.

[26] The filing of claim for compensation is an election and under the rule of exhaustion of administrative remedies requires that any pending suit be stayed or dismissed. *Simas* v. *Dugan,* (R. I., 1922) 116 Atl. 755.

We believe that this divergence of views respecting election confirms the practical correctness of the Supreme Court's statement in *Feres,* with respect to double recovery or election (340 U. S. at 144), that "there is as much statutory authority for one as for another of these conclusions" and that therefore the absence of any congressional direction "is persuasive that there was no awareness that the Act might be interpreted to permit recovery." Thus, we submit, on the one hand, that dismissal in these three cases of *Vatuone, Allen* and *Gibbs,* as in the Eighth Circuit's view of the *Dahn* case, might properly follow from libelants' acts of making claim and obtaining compensation despite filing suit. On the other hand, however, we believe that, as in the Supreme Court's view of the *Dahn* case, dismissal can be based equally, if not primarily, upon the ground that the terms of the Federal Employees' Compensation Act itself establish the congressional disposition "to treat the compensation as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U. S. 430). This latter approach accords with the majority rule of the *Mandel, Lewis, Johansen* and *Posey* cases; we urge its adoption here.

CONCLUSION

For the foregoing reasons, we believe that libelant was precluded from recovery, first, because the right to compensation benefits was exclusive, and, second, because claiming an award was an irrevocable elec-

tion which could not be rescinded by later returning the compensation checks. It is accordingly submitted, most respectfully, that the final decree of the court below should be reversed with instructions to dismiss the libel for failure to state a cause of action.

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